UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

No. 9243.

JOHN T. WATSON, LIQUIDATING RECEIVER OF AND FOR THE SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW MEXICO, APPELLANT,

VS.

REPUBLIC LIFE INSURANCE COMPANY OF DALLAS, TEXAS, A CORPORATION, H. B. HERSHEY, RECEIVER OF MISSISSIPPI VALLEY LIFE INSURANCE COMPANY, R. E. O'MALLEY AND WILLIAM E. CAULFIELD, RECEIVERS, J. G. VAUGHAN, M. J. DOUGHERTY, GRACE V. ROWELL, FORMERLY GRACE V. WALLACE, WILLIAM H. WALLACE, A MINOR, ANNA LOUISE WALLACE, A MINOR, R. L. DANIEL, CHAIRMAN OF THE BOARD OF THE INSURANCE COMMISSION OF THE STATE OF TEXAS, APPELLEES.

APPELLANT'S BRIEF.

FRANCIS C. WILSON,
Post-Office Address:
Sena Plaza, Santa Fe, New Mexico,
JOHN C. WATSON,
Post-Office Address:
Sena Plaza, Santa Fe, New Mexico,
FRED C. KNOLLENBERG,
Post-Office Address:
415 Caples Building, El Paso, Texas,
Attorneys for Appellant.

SUBJECT INDEX

Index of Authorities

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

No. 9243.

JOHN T. WATSON, LIQUIDATING RECEIVER OF AND FOR THE SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW MEXICO, APPELLANT,

VS.

REPUBLIC LIFE INSURANCE COMPANY OF DALLAS, TEXAS, A CORPORATION, H. B. HERSHEY, RECEIVER OF MISSISSIPPI VALLEY LIFE INSURANCE COMPANY, R. E. O'MALLEY AND WILLIAM E. CAULFIELD, RECEIVERS, J. G. VAUGHAN, M. J. DOUGHERTY, GRACE V. ROWELL, FORMERLY GRACE V. WALLACE, WILLIAM H. WALLACE, A MINOR, ANNA LOUISE WALLACE, A MINOR, R. L. DANIEL, CHAIRMAN OF THE BOARD OF THE INSURANCE COMMISSION OF THE STATE OF TEXAS, APPELLEES.

APPELLANT'S BRIEF.

To the Chief Justice and Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the appellant, John T. Watson, liquidating receiver of and for the superintendent of insurance of the State of New Mexico, and respectfully requests this court to review the decision of the District Court of the United States for the District of Arizona, rendered on March twenty-fourth, 1939, in cause No. E-361 on the docket of said court, wherein your appellant was plaintiff and Republic Life Insurance Company of Dallas, Texas, a corporation, H. B. Hershey, receiver of Mis-

sissippi Valley Life Insurance Company, R. E. O'Malley and William E. Caulfield, receivers, J. G. Vaughan, M. J. Dougherty, Grace V. Rowell, formerly Grace V. Wallace, William H. Wallace, a minor, Anna Louise Wallace, a minor, R. L. Daniel, chairman of the Board of the Insurance Commission of the State of Texas, were defendants. The court rendering judgment, sustaining the motion to dismiss filed by Republic Life Insurance Company of Dallas, Texas, J. G. Vaughan and M. J. Dougherty (Tr. p. 95). Appellant gave notice of appeal (Tr. p. 96) to this court and filed an appeal bond on June 22, 1939 (Tr. p. 96).

JURISDICTION OF THIS COURT.

This is a suit in equity wherein the matter in controversy exceeds, exclusive of interest and costs, $3,000.00, being a foreclosure of an equitable lien of $32,000.00 (Tr. pp. 25 and 46), and arises and exists between citizens of different states (Tr. pp. 25-28) (28 U. S. C. A., Sec. 41) and the right of review of the decision is given this court by 28 U. S. C. A., Section 225, as amended, and we sought to follow Rule 73, New Rules of Civil Procedure, as to the appeal.

STATEMENT OF PLEADINGS AND FACTS.

Defendants, Republic Life Insurance Company, J. G. Vaughan, and M. J. Dougherty, having filed their motion to dismiss the bill on the following grounds (Tr. pp. 84, 85) (in short):

(a) The complaint does not show plaintiff has legal capacity to sue.

(b) That the bill of complaint does not state facts sufficient to constitute a cause of action against these defendants, for the following reasons:

1. That the complaint does not allege amount due policyholders, for whose benefit and security the alleged securities mentioned in the complaint were deposited.

2. That the complaint does not show any lawful right or ownership in the plaintiff to the alleged securities or lien sued on and sought to be foreclosed.

3. That it shows upon the face of the complaint that the alleged securities sued on and sought to be foreclosed did not constitute an equitable lien or mortgage, or any lien or mortgage against the property described.

(c) That the assignments of securities described in the complaint and the instruments creating the alleged indebtedness were executed without the State of Arizona, and if the plaintiff, the superintendent of insurance of the State of New Mexico, or the State of New Mexico, or anyone, ever had any right to sue or foreclose, it is now barred by the provisions of Subdivision 3, Paragraph 2061, Revised Code of Arizona, 1928.

This raising strictly questions of law, it is fundamental that the motion admits as true all matters alleged in the complaint, and this raises practically three questions:

First. Has plaintiff the legal capacity and the right to sue?

Second. Does the amended bill state a cause of action?

Third. Is it barred by Subdivision 3, Paragraph 2061, of the Revised Code of Arizona, 1928?

Plaintiff filed his original complaint March 22, 1937, and the first amended bill of complaint was filed June 11, 1938 (Tr. pp. 25-83). Plaintiff pleaded that he is a citizen and resident of the city and County of Santa Fe, State of New Mexico, and duly qualified and acting liquidating receiver of and for the superintendent of insurance of the State of New Mexico, with respect to the assets in and belonging to a fund deposited with the superintendent of insurance pursuant to and in compliance with Section 38 of Chapter 48 of the laws of the then territory of New Mexico, enacted in the year 1909 (see Exhibit A, Tr. p. 48), which fund was created and stands under the law as security for full legal reserve of policies registered thereunder and issued by the National Life Insurance Company of the Southwest, which said policies were assumed successively by Two Republics Life Insurance Company and Mississippi Valley Life Insurance Company, an Illinois corporation, and the appellant is acting pursuant to appointment by the District Court of the County of Santa Fe, New Mexico, a court having general jurisdiction in law and in equity, and brings this suit under the authority of an order of court, a true copy of which is attached and marked Exhibit B (Tr. p. 50), and also under authority of an assignment by George M. Biel, the superintendent of insurance, a copy of which is attached, marked Exhibit C (Tr. pp. 51-53).

The purpose of this suit is to liquidate the security, which is in the nature of a real estate mortgage on lands within the jurisdiction of the district court.

That Republic Life Insurance Company of Dallas, Texas, is an insurance company organized as a corporation under the laws of the State of Texas, having its principal office and place of business in Dallas, Texas,

and is a citizen and resident of said state; H. B. Hershey is receiver of the Mississippi Valley Life Insurance Company and is a resident and citizen of the State of Illinois; and J. G. Vaughan is a citizen and resident of the State of Texas, residing in Dallas; the defendants, M. J. Dougherty, Grace V. Rowell, William H. Wallace and Anna Louise Wallace, are all citizens of the State of Arizona; and the defendant, R. L. Daniel, is chairman of the Board of Insurance Commissioners of the State of Texas, and resides in Austin, Texas.

Paragraph IV (Tr. p. 29) pleads that the above Exhibit A was repealed in 1925 by the new Insurance Code, and became thereafter Section 71-155 of the New Mexico Statutes, Annotated, 1925, which is attached as Exhibit D (Tr. p. 54), at which time the superintendent of insurance was created and invested by statute with all the powers of state bank examiner, particularly enforcing Section 71-155.

Paragraph V (Tr. p. 30). That the National Life Insurance Company of the Southwest issued many registered policies.

Paragraph VI. That prior to the year 1923 the National Life Insurance Company transferred all of its assets and business to the Two Republics Life Insurance Company, a Texas corporation, which assumed all the outstanding policy obligations of the National Life Insurance Company.

Paragraph VII. That on January 16, 1923, the Two Republics Life Insurance Company, being then the owner in fee of the following property situated in the County of Maricopa, State of Arizona, to-wit:

> The Southeast Quarter (SE 1-4) of Section Nineteen (19), Township One (1) North of Range

Six (6) East of the Gila and Salt River Base and Meridian;

entered into a contract for the sale thereof to James Q. Wallace and Grace V. Wallace, husband and wife, contract being attached, marked Exhibit E (Tr. p. 55), in which the Wallaces, in addition to the sum paid upon the execution and delivery of the contracts, agreed to make further payments aggregating $32,255.00, which contract and a warranty deed were put in escrow with the Salt River Valley Trust & Savings Bank of Mesa, Arizona, along with other papers, as therein stated (Tr. p. 31).

Paragraph VIII. That on April 5, 1923, the Two Republics Life Insurance Company assigned said contract and securities, by written assignment marked Exhibit F (Tr. p. 62), to the state bank examiner, to secure the registered policies of the National Life Insurance Company of the Southwest, pursuant to the requirements of said Section 38 of Chapter 48 of the Laws of 1909.

Paragraph IX (Tr. p. 33). That on the 25th day of April, 1923, the Two Republics Life Insurance Company and the Wallaces modified Exhibit E by supplemental agreement attached to the complaint as Exhibit G (Tr. p. 65).

Paragraph X. That on July 27, 1923, Two Republics Life Insurance Company executed another assignment of securities, Exhibit H (Tr. p. 69), which confirmed the lien and fixed its amount of $32,255.00.

Paragraph XI. That on May 15, 1924, for the purposes of facilitating and making safer and more effective the lien, in compliance with the requirement of the state bank examiner, Exhibit E was modified by Exhibit I

(Tr. p. 71), by which Wallaces and the Two Republics Life Insurance Company agreed that all the escrow papers should be withdrawn from the Salt River Valley Trust & Savings Bank of Mesa, Arizona, and deposited with the state bank examiner, and consent of Wallaces was therein given for the deposit of the securities with the superintendent of insurance of the State of New Mexico (Tr. p. 34).

Paragraph XII. That on the 3d day of March, 1928, Two Republics Life Insurance Company transferred and sold all of its assets and business to Mississippi Valley Life Insurance Company, a corporation duly organized under the insurance laws of the State of Illinois, and they assumed all the liabilities and obligations of the Two Republics Life Insurance Company, including the registered policies of the National Life Insurance Company of the southwest, and a deed to said property was recorded in Book 223 of the Records of Deeds of Maricopa County, Arizona, at page 74, and which deed, after being recorded, the Mississippi Valley Life Insurance Company deposited with the superintendent of insurance of the State of New Mexico, to further evidence the lien effected by the escrow contract aforesaid.

Paragraph XIII (Tr. p. 35). That at the time of the transfer Wallaces' escrow contracts were held and listed by the superintendent of insurance as security for $32,255.00, all of which was well known to and understood by the said defendant, Mississippi Valley Life Insurance Company.

Paragraph XIV (Tr. p. 36). That in the month of July, 1928, James Q. Wallace died and Grace V. Wallace was appointed and qualified as the administratrix of the estate, and acquired said land, subject to the lien afore-

said, and elected and agreed to continue said contract and keep same alive, and it was thereafter extended by Grace V. Wallace and the Mississippi Valley Life Insurance Company for two years after January 6, 1931, and on March 18, 1929, the Mississippi Valley Life Insurance Company executed and delivered to the superintendent of insurance of New Mexico an assignment of security, referred to as Exhibit J (Tr. pp. 75-77), and confirmed and renewed the lien at $32,000.00.

Paragraph XV (Tr. p. 37). That on April 25, 1932, the Mississippi Valley Life Insurance Company became insolvent, and the affairs of the insolvent corporation were placed in the hands of the defendants, receivers hereinbefore named, for the purpose of liquidation by such receivers.

Paragraph XVI. That on May 18, 1932, the receivers of the Mississippi Valley Life Insurance Company entered into a contract (Exhibit K, Tr. pp. 77-83) with defendant, Republic Life Insurance Company of Dallas, Texas, by which the defendant agreed to assume policy obligations of the Mississippi Valley Life Insurance Company, including the registered policies issued by National Life Insurance Company of the Southwest, but charging against each policy so assumed a lien in the amount of the whole legal reserve; that said contract did not contemplate transfer of title to the lands above described, and there never was or has been any transfer of title to said lands except as hereinafter stated, and Republic Life Insurance Company entered into the contract with full knowledge that the superintendent of insurance had, was entitled to, and claimed a lien upon the land aforesaid in the amount and for the purposes aforesaid.

Paragraph XVII (Tr. p. 38). That on August 22, 1932, defendant Banta, claiming to be the owner of the lands

aforesaid by transfer of the escrow contract by the Republic Life Insurance Company, but who in fact had no legal or equitable title to said land or escrow contract, commenced a suit in the Superior Court of Maricopa County, Arizona, against A. O. Pelsue as receiver of the Mississippi Valley Life Insurance Company, appointed August 22, 1932, which suit resulted in a decree dated August 22, 1932, adjudging Banta to be the owner in fee simple of the lands, and ordering the said receiver Pelsue to execute to Banta a deed therefor, which said deed was recorded in the recorder's office of Maricopa County in Book 267 of Deeds, at pages 349 and 350; that Pelsue as such receiver did on August 22, 1932, execute a quit claim deed recorded in Book 267 of Deeds, at page 350; that on September 10, 1932, defendant, Republic Life Insurance Company of Dallas, Texas, executed and delivered to E. H. Banta a warranty deed conveying the lands aforesaid, which deed is of record in the office of the county clerk of Maricopa County, Arizona, in Book 267 of Deeds, at pages 550 and 551; and that the Republic Life Insurance Company on said date had and owned no title to said property. That on September 10, 1932, Grace V. Rowell, formerly Grace V. Wallace, delivered to said Banta a warranty deed purporting to convey the lands aforesaid, which deed is recorded in Book 267 of Deeds, at pages 536 and 537 thereof, and that said deed was delivered pursuant to a contract made on August 20, 1932, between Grace V. Rowell of one part and the defendant, Republic Life Insurance Company, of the other part, which recognized the escrow contract, but the said contract of sale or deed was not authorized by the court nor confirmed by the court as in the statutes in such cases made and provided, and did not sell and convey the interest of the minors, William H. Wallace and Anna Louise Wallace.

Paragraph XVIII (Tr. p. 40). That said E. H. Banta was on said date vice-president of the defendant, Republic Life Insurance Company of Dallas, Texas, and Banta personally negotiated with the receivers aforesaid the agreement (Exhibit K), brought the suit No. 37799 in the Superior Court of Maricopa County, Arizona, entitled *Banta* v. *Pelsue,* and made the contract with Grace V. Rowell, and had full knowledge and notice that the lands aforesaid were subject to the lien of the superintendent of insurance of the State of New Mexico, for security, as aforesaid, and the superintendent of insurance of New Mexico had no knowledge or notice of and was not made a party to any of the various transactions or the judgment aforesaid by which E. H. Banta procured for himself the various deeds to said land, and if said Banta did acquire legal title to said land, then such title is subject to the lien of the superintendent of insurance of the State of New Mexico.

Paragraph XIX (Tr. p. 40). That on March 13, 1933, E. H. Banta executed and delivered to the defendant, J. G. Vaughan, a warranty deed, recorded in Book 272 of Deeds, at page 478, and at that time J. G. Vaughan was an officer and employee of the Republic Life Insurance Company of Dallas, Texas, and had full knowledge and notice of the lien and right and claim of lien of the superintendent of insurance of the State of New Mexico, and that the defendant, J. G. Vaughan, took the title in trust for Republic Life Insurance Company of Dallas, Texas, and thereupon executed and delivered to the Republic Life Insurance Company of Dallas, Texas, a conveyance of said land, which has been and is now withheld from record, and the defendant, Republic Life Insurance Company, claims to own said land, and has since the filing of this suit, and after demand made by plaintiffs upon

them for possession, obtained from said J. G. Vaughan and his wife a deed to said land, which was filed for record in the records of deeds of Maricopa County, Arizona, on the 12th day of April, 1938; and thereafter the Republic Life Insurance Company transferred said property to R. L. Daniels, chairman of the Board of Insurance Commissioners of the State of Texas, which deed was filed for record April 12, 1938, and recorded in Book 321 of the Deed Records of Maricopa County, Arizona, at pages 317 and 318.

Paragraph XX (Tr. p. 42). That the defendant Dougherty has been in possession of the lands for the last three years, with full knowledge and notice of the lien and claim of the superintendent of insurance.

Paragraph XXI (Tr. p. 42). That Grace V. Rowell and her two children, William H. Wallace and Anna Louise Wallace, and R. L. Daniel, claim some interest in the property.

Paragraph XXII (Tr. p. 43). That the defendant, Republic Life Insurance Company, is not, and never has been, licensed or authorized to do business in the State of New Mexico, and has never submitted to the jurisdiction or authority of the superintendent of insurance since undertaking the risks and liabilities of the Mississippi Valley Life Insurance Company, including the registered policies issued by the National Life Insurance Company of the Southwest, nor have they complied or pretended to comply with the requirements of the New Mexico statutes, and that the superintendent of insurance has no power to require defendant, Republic Life Insurance Company of Dallas, Texas, to maintain a deposit for the statutory purposes aforesaid, but is compelled to rely upon the security in his hands at the date of the insolvency.

Paragraph XXIII (Tr. p. 44). The superintendent of insurance was not a party to either the aforesaid receivership proceedings in the State of Arizona entitled *Dougherty* v. *Mississippi Valley Life Insurance Company,* No. 37332, or the suit in Arizona entitled, *Banta* v. *Pelsue,* No. 37799, both on the docket of the Superior Court of Maricopa County, Arizona, and had no knowledge until November, 1935, that there had been an attempted surrender and merger of the interest of the Wallaces as vendees in said executory contract, nor of any other transactions hereinbefore set forth by means whereof said E. H. Banta and Republic Life Insurance Company of Dallas, Texas, intended and attempted to subvert, circumvent and defeat the lien aforesaid, all of which were concealed from said superintendent of insurance, and all of which proceedings were void upon their face and cannot and do not affect the lien or claim of this plaintiff.

Paragraph XXIV (Tr. p. 44). That appellant did by telegram, on the 17th day of March, 1937, and again on or about the 13th day of April, 1937, through his attorney, make a demand upon the Republic Life Insurance Company of Dallas, Texas, for an acknowledgment and payment of the lien and demand for possession of the property, and defendant did not reply to the first demand, and refused the second demand made for possession.

Paragraph XXV (Tr. p. 45). That as fully appears from the allegations foregoing, your appellant is without remedy in the premises except in a court of equity, and will suffer irreparable loss and injury unless afforded the relief prayed for, the prayer being (Tr. pp. 45-47), after a recital of the appearances: (2) That the court appoint a guardian *ad litem* to represent William W. Wallace and Anna Louise Wallace, and subpoena issue directed

to Grace V. Rowell and said guardian *ad litem* to appear and answer the allegations; (3) that process issue for service upon R. L. Daniel; (4) that after hearing herein the court render its decree, declaring and establishing a lien in the nature of a mortgage in favor of your orator upon the lands hereinbefore described and the appurtenances thereto, in the sum of $32,000.00, and declaring and establishing such lien to be superior and prior to any and all interest or claim of each and all of the defendants, such lien to be had and held by your orator as liquidating receiver as an asset of his said trust, and to be enforced, applied and distributed as a security deposited pursuant to the provisions of Section 38 of Chapter 48, of the Laws of New Mexico, for the year 1909, for security of the full legal reserve of policies of said National Life Insurance Company of the Southwest, issued and registered thereunder; (5) that your orator further prays that having declared and established a lien, the court further decree the amount thereof to be presently due and payable, and that unless the defendants or some of them pay off and satisfy the amount thereof within a time by such decree to be specified, your orator may and shall have foreclosure thereof, and that said lands be sold in the manner provided by law for foreclosure of liens on real estate, according to the rules and practice of this court, for satisfaction of the sum of $32,000.00; (6) that your orator further prays for such other, further or different relief in the premises as may appear meet and equitable.

H. B. Hershey, receiver of Mississippi Valley Life Insurance Company, who is the statutory receiver of Mississippi Valley Life Insurance Company, answered the complaint (Tr. p. 21), and admitted the allegations with

respect to the jurisdiction, and the following paragraphs of our complaint, admitting the following facts:

VII. That on January 16, 1923, the Two Republics Life Insurance Company was the owner in fee of the Southeast 1-4 of Section 19, and entered into a contract of sale with James Q. Wallace and Grace V. Wallace, being Exhibit E, and that the Wallaces, in addition to the sum paid upon the execution and delivery of the contract, agreed to make further payments aggregating $32,255.00, and that the contract and deed were put in escrow with the Salt River Valley Trust and Savings Bank of Mesa, Arizona.

VIII. That on April 5, 1923, Two Republics Life Insurance Company assigned said contract and securities by Exhibit F to the state bank examiner of New Mexico, to secure registered policies of the National Life Insurance Company of the Southwest.

IX. That on April 25, 1923, Wallaces and the Two Republics Life Insurance Company modified Exhibit A by a supplemental agreement attached to the complaint as Exhibit G.

X. That on July 27, 1923, Two Republics Life Insurance Company executed another assignment of securities, Exhibit H, confirming the lien, and fixed its amount at $32,255.00.

XI. That on May 15, 1924, for the purpose of facilitating and making safer and more effective the lien in compliance with the requirement of the state bank examiner, Exhibit E was modified by Exhibit I, by which Wallaces and Two Republics Life Insurance Company agreed that all escrow papers should be withdrawn from the Salt River Valley Trust & Savings Bank of Mesa,

Arizona, and deposited with the state bank examiner, and the consent of Wallaces was therein given for the deposit of the securities with the superintendent of insurance.

XII. That on March 3, 1928, Two Republics Life Insurance Company transferred and sold all of its assets and business to the Mississippi Valley Life Insurance Company, an Illinois corporation, which assumed all the liabilities and obligations of Two Republics Life Insurance Company, including the registered policies of the National Life Insurance Company of the Southwest, and the deed to said property was recorded in Book 223 of the Deed Records of Maricopa County, page 74, and after being recorded, the Mississippi Valley Life Insurance Company deposited that deed with the superintendent of insurance of the State of New Mexico, to evidence the lien effected by the escrow contract.

XIII. That at the time of the transfer Wallaces' escrow contracts were held and listed by the superintendent of insurance as security for $32,255.00, and that was well known and understood by the defendant, Mississippi Valley Life Insurance Company.

XIV. That in the month of July, 1928, James Q. Wallace died and Grace V. Wallace was appointed and qualified as administratrix of the estate and acquired said land subject to the lien aforesaid, and elected and agreed to continue the contract, to keep same alive, and it was thereafter extended by Grace V. Wallace and the Mississippi Valley Life Insurance Company for two years after January 6, 1931, and on March 18, 1929, the Mississippi Valley Life Insurance Company executed and delivered to the superintendent of insurance of New Mexico, an assignment of security, referred to as Exhibit J and confirmed and renewed the lien at $32,000.00.

XV. That on April 25, 1932, the Mississippi Valley Life Insurance Company became insolvent and the affairs of the insolvent corporation were placed in the hands of receivers, for the purpose of liquidation by such receivers.

This answer was signed and sworn to by H. B. Hershey (Tr. pp. 23, 24).

Defendant, R. L. Daniel, life insurance commissioner of the State of Texas, answering (Tr. p. 86), admits he holds title in trust but Republic National Life fully represents his interest.

Grace V. Rowell, answering for herself and as guardian *ad litem* of William H. Wallace and Anna Louise Wallace, minors (Tr. pp. 88-92), admits the following:

VII. That on January 16, 1923, the Two Republics Life Insurance Company was the owner in fee of the Southeast 1-4 of Section 19, and entered into a contract of sale with James Q. Wallace and Grace V. Wallace, being Exhibit E, and that the Wallaces, in addition to the sum paid upon the execution and delivery of the contract, agreed to make further payments aggregating $32,255.00, and that the contract and deed were put in escrow with the Salt River Valley Trust and Savings Bank of Mesa, Arizona.

IX. That on April 25, 1923, Wallaces and the Two Republics Life Insurance Company modified Exhibit A by a supplemental agreement attached to the complaint as Exhibit G.

XI. That she and her husband signed Exhibit I.

XIV. She admits (Tr. p. 90) James Q. Wallace died in July, 1928; that she was appointed and qualified as administratrix of the estate of James Q. Wallace; that the

Mississippi Valley Life Insurance Company agreed with her to continue and keep the executory contract alive in the name and right of the administratrix, and that said contract was extended for a period of two years after January 16, 1931, and that there was paid upon said contract $1,000.00 in 1924 and $1,000.00 in 1925.

XVII. She admits (Par. VI, p. 91) that on September 10, 1932, Grace V. Rowell, formerly Grace V. Wallace, and widow of James Q. Wallace, deceased, then wife of F. D. Rowell (joined *pro forma* by her husband), individually, and as administratrix of the estate of James Q. Wallace, deceased, executed and delivered to said Banta a warranty deed purporting to convey the lands aforesaid, which deed is recorded in the office of the county recorder of said County of Maricopa, State of Arizona, in Book 267 of Deeds, at pages 536-7 thereof; that said deed was delivered pursuant to a contract made on August 20, 1932, between said Grace V. Rowell of one part and defendant, Republic Life Insurance Company of the other part, which recognized the escrow contract, but the contract of sale or deed was not authorized by the court nor confirmed by the court, as in the statutes in such cases made and provided.

This answer was signed and sworn to by Grace V. Wallace Rowell (Tr. p. 93).

Three defendants, Republic Life Insurance Company of Dallas, Texas, J. G. Vaughan and M. J. Dougherty, filed the motion to dismiss (Tr. pp. 84-86) referred to above, which were argued and submitted on briefs, and after consideration Judge Ling sustained the motions, and on March 24, 1939, entered his judgment (Tr. p. 95):

> "That the motion of Republic Life Insurance Company of Dallas, Texas, a corporation, J. G.

Vaughan and M. J. Dougherty to dismiss complainant's first amended bill of complaint be, and the same is hereby granted, and that the above-entitled suit be, and the same is hereby, dismissed."

Notice of appeal and appeal bond were filed on June 22, 1939.

Points relied upon for reversal are set out on pages 102 and 103 of the transcript, which we desired to conform to Rule 19-6, and are but the affirmative of the points raised by the motion to dismiss, and these we arranged in the form of specification of errors, on account of the statement in Rule 20-2(d), which we hope meets requirements of the rules.

SPECIFICATION OF ERRORS.

First Assignment of Error.

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, holding in substance that said complaint shows upon its face that plaintiff has not legal capacity to sue (germane to point relied upon for reversal, No. 1, Tr. p. 102).

Second Assignment of Error.

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, holding in substance that said complaint did not state facts sufficient to constitute a cause of action against said defendants, because it does not allege any amount due the policyholders for whose benefit and security the alleged securities were deposited with the superintendent of insurance of the State of New Mexico, or any amount sought to be recovered (germane to Point 3, Tr. p. 102).

Third Assignment of Error.

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, holding in substance that said complaint did not state facts sufficient to constitute a cause of action against said defendants, for the reason that said complaint does not show any lawful right or ownership in the plaintiff to the alleged securities, or lien sued on and sought to be foreclosed, or right or authority to maintain any action against said defendants, or any of them, for recovery thereunder or foreclosure thereof (germane to Points 2, 4 and 5, Tr. p. 102).

Fourth Assignment of Error.

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, holding in substance that said complaint does not state facts sufficient to constitute a cause of action against answering defendants, for the reason that it shows upon the face of said complaint that the alleged securities sued on and sought to be foreclosed do not constitute an equitable lien, or mortgage, or any lien or mortgage, against the property described in the complaint and against which said securities are sought to be foreclosed (germane to Point 6, Tr. p. 102).

Fifth Assignment of Error.

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, upon the ground and for the reason that the assignments of securities described in the complaint and the instruments creating the alleged indebtedness sued on were executed without the State of Arizona, and that if plaintiff, or the superintendent of insurance of the State of New Mexico, or the State of New Mexico, or any one, ever had any right to sue on and enforce or foreclose the same, such right was, at the time of the filing of the bill of complaint herein, and is now, barred by the provisions of Subdivision 3, Paragraph 2061, Revised Code of Arizona, 1928 (germane to Point 7, Tr. p. 103).

These we will take up in their order, they being the questions raised by these appellees' motion to dismiss, and being the reverse of our points relied upon for reversal (Tr. pp. 101, 102), and we decided it might be better to follow the words of the motion rather than the affirmative statement thereof.

FIRST ASSIGNMENT OF ERROR.

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, holding in substance that said complaint shows upon its face that plaintiff has not legal capacity to sue (germane to point relied upon for reversal, No. 1, Tr. p. 102).

SUMMARY.

Complaint alleges appellant is duly qualified and acting liquidating receiver of and for the superintendent of insurance of State of New Mexico (Tr. p. 26), and he brings the suit under an order of court appointing him (Tr. pp. 50, 51), which is a court of general jurisdiction, and he also holds an assignment, "Exhibit C" (Tr. pp. 51-53), from the superintendent of insurance.

On March 22, 1937, appellant presented a petition for leave to sue (Tr. p. 3), alleging all facts as to ownership of lien, the reason, necessity and authority for the suit, and that there were no Arizona creditors that can have any claim, and that the Republic Life Insurance Company of Dallas are claiming to own the property, as shown by Exhibit D attached (Tr. p. 20), being a letter from R. L. Daniel's office dated March 12, 1937.

ARGUMENT AND AUTHORITIES.

The new federal rules of procedure provide it is not necessary to aver capacity to sue or be sued in a representative capacity and if a party desires to raise an issue thereof *he shall do so by SPECIFIC negative averment.*

Rule 9-a, Rules of Civil Procedure.

The real party in interest must bring the suit * * * trustee of an express trust or a person expressly authorized by statute.

Revised Code of Arizona, 1928, Article 3727.

We alleged we are trustee acting for the registered policyholders, and we have an assignment of the lien (Exhibit C, Tr. pp. 51-53), from a statutory officer of the State of New Mexico.

The trustee of an express trust may bring suit.

Relf v. *Rundle,* 103 U. S. 222, 26 L. Ed. 337.

Bernheimer v. *Converse,* 206 U. S. 516, 51 L. Ed. 1163.

Hopkins v. *Lancaster,* 254 Fed. 190.

O'Malley v. *Hankins,* (Ind.) 194 N. E. 168.

Martin v. *Bankers Trust Co.,* 156 Pac. 97, 18 Ariz. 55.

Practically unanimous are the decisions that hold that even foreign chancery receivers have the right to sue in a foreign state if no rights of citizens of that state are involved:

Ashcroft v. *Bream,* (Penn.) 51 F. (2d) 301.

Smith v. *Shepler,* (Cal.) 48 Pac. (2d) 999.

Van Kempen v. *Latham,* 195 N. C. 389, 142 S. W. 322.

Good v. *Derr,* (Wis.) (U. S. C. C. A., 7th Cir.). 46 F. (2d) 411, certiorari denied.

Seested v. *Bonfils,* (Colo.) 33 F. (2d) 185.

O'Malley v. *Hankins,* 194 N. E. 168, 207 Ind. 589.

Mell v. *McNulty,* (Ga.) 195 S. W. 181.

Devine v. *Detroit Trust Co.,* 52 Ohio App. ------, 3 N. E. (2d) 1001.

Canfield v. *Scripps,* (Cal.) 59 Pac. (2d) 1040.

This method of attack by demurrer has been used many times, and many times have the trial courts held

with the theory of the trial court, but the appellate courts have, where the receiver holds title, said he was entitled to sue and have a hearing.

The right of a receiver came up on a demurrer in Wisconsin and the trial court sustained the demurrer, holding the receiver had no right to sue, but the United States Circuit Court of Appeals reversed the case, after an excellent discussion.

Good v. *Derr*, 46 F. (2d) 411, certiorari denied 75 L. Ed. 1457.

A foreign receiver if he is the assignee of a mortgage can sue and foreclose in California.

Iowa & California L. Co. v. *Hoag*, 64 Pac. 1073.

The securities deposited with the insurance department of New Mexico is a special trust fund to pay off the registered policyholders, and until they are paid, no one else has any right to any of the funds.

Phillips v. *Perue*, 111 Tex. 112, 229 S. W. 849.

This was reviewed in an excellent case in New York.

In re Phillips, 200 N. Y. Supp. 639.

This same rule has been considered in many other cases.

People v. *Granite State, etc., Assn.*, 55 N. E. 1053.

Texas F. & Bonding Co. v. *Austin*, 246 S. W. 1026.

Blake v. *McClung*, 172 U. S. 239, 43 L. Ed. 432, 439.

The question as to the right of the superintendent of insurance to administer the funds through a receiver is discussed and the conditions are nearly identical.

Holloway v. *Federal R. L. Ins. Co.*, 21 Fed. Supp. 516.

Judge Bratton speaking for the Circuit Court of Appeals, Tenth Circuit, discussed this question fully and held a "liquidating receiver" was the proper person to handle the securities, and says all parties can present their claims and receive their *pro rata* part.

Hobbs v. *Occidental Life*, 87 F. (2d) 380 (C. C. A. 10th).

Occidental Life evidently tried to get the securities for the case was again before the Circuit Court of Appeals, Tenth Circuit.

Kansas v. *Occidental Life Ins. Co.*, 95 F. (2d) 935.

The lien sued upon here is admitted by receiver of Mississippi Valley Life Insurance Company an asset deposited with the insurance department to secure registered policy holders under Compiled Laws of New Mexico, 1929, Chapter 71-155, and no one has the right to divert the funds, especially Republic Life Insurance Company of Dallas, Texas, who made the reinsurance contract, Exhibit K (Tr. p. 79), for they specifically agreed in Paragraph 3 thereof that the insurance department of the State of New Mexico had the securities and to receive the reserve "in the manner that the insurance department of New Mexico shall approve but all excess to belong to Alvin S. Keys, receiver."

United States Circuit Court of Appeals said the right to participate could not be taken away by any reinsurance agreement.

Hobbs v. *Occidental Life*, 87 F. (2d) 380.

Therefore, appellant says that the appellant as liquidating receiver had legal capacity to sue, for he first obtained permission of Judge David Chavez of the District Court of New Mexico (Tr. p. 50), he presented a petition for leave to file this suit and leave was granted

by Judge Ling (Tr. p. 3, *et seq.*), and he holds a transfer or assignment of the lien sued upon from the superintendent of insurance of the State of New Mexico, and H. B. Hershey, the receiver of the Mississippi Valley Life Insurance Company, who owes the money, admits the obligation and that appellant has the right thereto.

SECOND ASSIGNMENT OF ERROR.

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, holding in substance that said complaint did not state facts sufficient to constitute a cause of action against said defendants, because it does not allege any amount due the policyholders for whose benefit and security the alleged securities were deposited with the superintendent of insurance of the State of New Mexico, or any amount sought to be recovered (germane to Point 3, Tr. p. 102).

SUMMARY.

We pleaded (Tr. p. 31) that James Q. Wallace and Two Republics Life Insurance Company made an executory contract; that it was deposited with the consent of Wallaces (Exhibit I, Tr. p. 73) with the insurance department of New Mexico, to secure registered policyholders of certain policies which were assumed by Mississippi Valley Life Insurance Company, and assigned by Exhibit J to the state bank examiner as of value of $32,000.00 (Tr. p. 76), and was admitted by H. B. Hershey, receiver, to be for the sum of $32,000.00 (Exhibit J, Tr. p. 75).

The contract was admitted by Mrs. (Wallace) Rowell to be for $32,255.00 and she made the deed to Republic Life Insurance Company pursuant to a contract recognizing the escrow obligation (Tr. p. 91).

Republic Life Insurance Company made a reinsurance agreement with the receivers of Mississippi Valley Life Insurance Company (Exhibit K, Tr. p. 77). Paragraph 3 recognizes that the insurance department of New Mexico had securities on deposit and they should have certain credit for their assumption of liens in the manner as the insurance department of New Mexico should approve.

The District Court of New Mexico authorized this suit to be brought, stating:

> "And it appearing to the court that the assets now in the hands of the receiver are insufficient to pay all claims now filed or to be filed herein." See order (Exhibit B, Tr. p. 50.)

ARGUMENT AND AUTHORITIES.

These questions were raised in the motion to dismiss (Tr. p. 84) and we will try to separate the basis of the motion.

First. The bill does not allege the amount due the policyholders for whose benefit the securities were deposited.

The court in his order deemed it necessary to bring the suit and liquidate the Wallace security (Exhibit B, Tr. p. 50), so we cannot question that here.

It is sufficient when comptroller levies an assessment, and one cannot question the order, it is conclusive.

Casey v. *Galli*, 94 U. S. 673, 24 L. Ed. 168.

No contract could be made by Republic Life which would give them a preferential right to any securities. They must make their claim through the insurance department of New Mexico in accordance with their agreement.

Hobbs v. *Occidental Life*, (C. C. A. 10th) 87 F. (2d) 380.

In many cases it is not necessary to allege that there are unpaid claims or that the assets in the hands of the receiver are insufficient to pay them.

Coddington v. *Canaday,* 157 Ind. 243, 61 N. E. 567.

High on Receivers, Sec. 212 (4th Ed.).

Van Gilder v. *Parker,* 69 Colo. 196, 193 Pac. 664.

The judgment of Judge Chavez (Tr. p. 50), "That the assets now in the hands of the receiver are insufficient to pay all claims, etc.," is entitled to full faith and credit, and this court should not question it.

Justice Brandeis tersely stated the rule.

McKnett v. *S. L. & S. F. Ry. Co.,* 292 U. S. 230, 78 L. Ed. 1227.

The Supreme Court in a suit brought by a receiver in Colorado against a stockholder for an assessment levied in Minnesota cited *Bernheimer* v. *Converse,* 206 U. S. 516, 51 L. Ed. 1163, and *Converse* v. *Hamilton,* 224 U. S. 243, 56 L. Ed. 749, and held that the levy made by a District Court in Minnesota could not be attacked in Colorado.

Chandler, Recr., v. *Peketz,* 297 U. S. 609, 80 L. Ed. 881.

This is exactly the position we take with regard to the judgment of the District Court in New Mexico, and there is a full note in 80 L. Ed., p. 883.

Wherefore, we feel the district court erred in sustaining the motion to dismiss, for we do not think the question as to claims is open for adjudication here, as the district court determined suit should be brought and ordered it brought to foreclose, and we pleaded (Par. XXII, Tr. p. 43) that the Republic Life Insurance Company has never submitted itself to the jurisdiction of

New Mexico and has not attempted to comply with the insurance statutes, and in their reinsurance contract (Exhibit K, Tr. p. 79) they agree to assume the liabilities with the consent of the insurance department of New Mexico, and are entitled to have the reserves credited in such a manner as the insurance department shall approve, and in no other way are they entitled to any of the securities on deposit there, including the Wallace contract and lien, so we feel, unless they comply with their contract they are entitled to nothing and it is their duty to plead and prove their compliance with Exhibit K or they have no rights thereunder. It is a proper matter for answer and proof, not by motion to dismiss, if the question is an open one in the face of Judge Chavez' order for it is our idea that if Republic Life Insurance Company is entitled to raise that question they must do it in New Mexico, where the trust is being administered.

THIRD ASSIGNMENT OF ERROR.

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, holding in substance that said complaint did not state facts sufficient to constitute a cause of action against said defendants, for the reason that said complaint does not show any lawful right or ownership in the plaintiff to the alleged securities, or lien sued on and sought to be foreclosed, or right or authority to maintain any action against said defendants, or any of them, for recovery thereunder or foreclosure thereof (germane to Points 2, 4 and 5, Tr. p. 102).

SUMMARY.

We plead deposit of the Wallace contract and lien to secure registered policyholders of National Life Insurance Company of the Southwest, made by Two Republics Life Insurance Company, the owner of the fee

(Tr. pp. 30-32), and that Mississippi Valley Life Insurance Company received a deed for land from Two Republics Life Insurance Company (Tr. pp. 34, 35) and they recognized our lien for $32,255.00.

H. B. Hershey as statutory receiver of Mississippi Valley Life Insurance Company, also recognized and admitted our lien (Tr. p. 21) upon the Wallace property and they held legal title and were obligated thereon.

Defendant, Mrs. Rowell, formerly Grace V. Wallace, one of the signers of Exhibit E (Tr. p. 55), the contract of sale, admitted the lien thereof, and she was obligated thereon (Tr. p. 89).

The insurance commissioner has power to transfer a note (deposited as security by an insurance company) to a receiver, and the receiver has power to sue.

Phillips v. *Perue,* 111 Tex. 112, 229 S. W. 849.

Hobbs v. *Occidental Life,* 87 F. (2d) 380 (C. C. A. 10th).

Cochrane v. *Pacific States Life,* 27 Pac. (2d) 196, 93 Colo. 462.

Kansas v. *Occidental Life,* 95 F. (2d) 935.

A foreign reciever may maintain a suit where title to the property has been vested in him by conveyance or statute.

Bernheimer v. *Converse,* 206 U. S. 516, 51 L. Ed. 1163.

Relf v. *Rundle,* 103 U. S. 226, 26 L. Ed. 337.

Lewis v. *Clark,* (C. C. A. 9th) 129 Fed. 570.

Justice Van Devanter discussed this question at great length and held the receiver could sue.

Converse v. *Hamilton,* 224 U. S. 243, 56 L. Ed. 749.

This same question arose in this court and plaintiff moved for dismissal on ground that the plaintiff had

no capacity to sue since he had neither title to the property under statute nor order of the court appointing him. Judge Sawtelle, speaking for this court, sustained the dismissal.

Oakes v. *Lake,* 62 F. (2d) 728.

Supreme Court said if receiver has title he has the right to maintain the suit.

Oakes v. *Lake,* 290 U. S. 59, 78 L. Ed. 168.

Receiver's right to sue in California is well stated.

Wright v. *Phillips,* 213 Pac. 288.
Smith v. *Shepler,* 48 Pac. (2d) 999.

Our authority, our ownership, and right to sue, are fully stated.

Hopkins v. *Lancaster,* 254 Fed. 190.

The Republic Life Insurance Company had no right under the reinsurance contract (Exhibit K, Tr. p. 79) to any part of the securities deposited with the insurance department of New Mexico, unless the registered policyholders accept the new contract, and then only in such manner as the insurance department of New Mexico shall approve (Paragraph 3), and if they do not accept the new company the policyholders have the right to the funds on deposit.

This condition has been before the courts, and they are pretty well settled as to the respective rights, for they hold it a trust fund for policyholders.

Lavell v. *St. Louis Mut. L. I. Co.,* 111 U. S. 264, 28 L. Ed. 423.

Old Republic, etc., Co. v. *Hershey,* 15 N. E. (2d) 985.

The facts are identical and this United States Circuit Court of Appeals, speaking through Judge Hawley,

held that Watson as liquidating receiver has the authority and right to foreclose.

Lewis v. *Clark*, 129 Fed. 570, 64 C. C. A. 138 (9th Cir.).

The appellant Watson's authority and title is the same as upheld by the United States District Court of Missouri, and we have the same authority and the same rights.

Holloway v. *Federal Ins. Co.*, 21 Fed. Supp. 516.

The same question was raised by demurrer to the right of state bank commissioner to sue, but Judge Lockwood, speaking for the Arizona Supreme Court, held the demurrer was improperly sustained, and he should be allowed to sue.

McKee v. *Stewart*, 28 Ariz. 511, 238 Pac. 326.

Appellant feels we have the ownership of the security for it was assigned to us by a state agency (superintendent of insurance) having title recognized by the receiver of the real owner, Mississippi Valley Life Insurance Company, who do not question our right, and this objection covering also our right and authority to sue these defendants, Republic Life Insurance Company, J. G. Vaughan and M. J. Dougherty, who we say make a claim to the land, and in view of the fact that this is an equitable foreclosure they should be defendants. This, we think, will not be questioned.

FOURTH ASSIGNMENT OF ERROR.

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, holding in substance that said complaint does not state facts sufficient to constitute a cause of action against answering defendants, for the reason that it shows upon the face of said complaint that the alleged securities sued on and sought to be foreclosed do not constitute an equitable lien, or mortgage, or any lien or mortgage, against the property described in the complaint and against which said securities are sought to be foreclosed (germane to Point 6, Tr. p. 102).

SUMMARY.

Complaint is brought to foreclose on an equitable lien on the Southeast 1-4 of Section 19, Township 1 North, Range 6 East, G. & S. R. B. & M., which was owned in fee by Two Republics Life Insurance Company (Par. IV, Tr. p. 31). They gave a contract to sell for $32,255.00 and James Q. Wallace and Grace V. Wallace (now Grace V. Rowell) agreed to buy it for said sum and both executed Exhibit E (Tr. p. 55). This contract of sale accompanied by deeds was escrowed and finally Wallaces executed an agreement (Exhibit D) consenting to the deposit with the superintendent of insurance of the securities referred to in said contract of January 16, 1923 (being Exhibit E), which is plain, and Mrs. Grace V. Rowell admitted signing Exhibit I (Tr. p. 89, Par. IV).

There was a number of assignments of the securities, the last one being Exhibit J (Tr. pp. 75, 76), on March 18, 1929, from Mississippi Valley Life Insurance Company, to state bank examiner, to secure the registered policyholders of National Life Insurance Company of the Southwest. The contract was extended by Grace V. Wallace two years after January 16, 1931 (she admits this in her answer, Par. V, Tr. p. 90).

Reinsurance contract (Exhibit K, Tr. pp. 77 *et seq.*) made full provision for protection of the policies secured by the deposit with the insurance department of the State of New Mexico (Par. III, Tr. p. 79).

Two Republics Life Insurance Company gave Mississippi Valley Life Insurance Company a deed to the property on June 4, 1928, recorded Book 223 of Deeds, page 74 (Par. XII, Tr. p. 35).

ARGUMENT AND AUTHORITIES.

In this case there is no question but what Mississippi Valley Life Insurance Company had a deed from Two Republics Life Insurance Company, which was recorded, so held legal title, and Grace V. Wallace (Mrs. Rowell) had a contract to buy the property from Two Republics Life Insurance Company, so she held the equitable title, and the insurance department of the State of New Mexico held as security the contract and deeds for the payment of $32,000.00 or $32,255.00, which were deposited in trust for a definite purpose, and both Mississippi Valley Life Insurance Company and Mrs. Rowell (Grace V. Wallace) recognized it.

Republic Life Insurance Company, J. G. Vaughan or M. J. Dougherty could not be in a better position than either Mississippi Valley Life Insurance Company or Grace V. Wallace (Mrs. Rowell).

There is a very full and exhaustive article holding the deposit of title papers creates an equitable mortgage.

41 C. J., p. 305, Sec. 54 *et seq.*

The Supreme Court of the United States recognized a transaction such as the Wallace deal was an equitable lien, and said:

> "Any other person coming into possession under the vendee, either with his consent or as an intruder, is bound by a like estoppel."

And also:

> "The debt did not affect his assignee personally, but as we have also shown it continued to bind the land in all respects as if the transfer had not been made. The trust was an express one."

And also:

> "As between trustee and *cestui que trust,* in the case of an express trust, the statute of limitation has no application, and no length of time is a bar. Accounts have been decreed against trustees extending over periods of thirty, forty and even fifty years."
>
> *Lewis* v. *Hawkins,* 90 U. S. 119, 23 L. Ed. 113.

The Circuit Court of Appeals for the Eighth Circuit holds that we are entitled to treat the transaction as a mortgage and foreclose.

Nixon v. *Marr,* 190 Fed. 913, 111 C. C. A. 503.

Deposit of title papers has always, even in England, been regarded as creating an equitable mortgage.

41 C. J., Sec. 54, p. 305 *et seq.*

There is also a good discussion under Equitable Mortgages, specially treating deposit of title papers.

19 R. C. L., p. 273, Secs. 44-48.

Equitable liens may always be enforced in the courts of equity.

21 C. J., p. 119, Note 47.

Most frequent of these is the equitable mortgage.

21 C. J., p. 119, Note 49.

This same trial court foreclosed an identical contract on the John R. Wallace tract of land in Case E-193, Phoenix, being entitled *Mississippi Valley Life Insurance Company* v. *John R. Wallace et al.,* the decree being dated July 31, 1931, and foreclosed the lien as a mortgage,

and in the suit M. J. Dougherty (one of the answering defendants herein) acted as attorney for plaintiff.

Appellant, therefore, says the court was in error on this ground, for the papers do constitute an equitable lien or mortgage, and this we ask this court to hold.

FIFTH ASSIGNMENT OF ERROR.

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, upon the ground and for the reason that the assignments of securities described in the complaint and the instruments creating the alleged indebtedness sued on were executed without the State of Arizona, and that if plaintiff, or the superintendent of insurance of the State of New Mexico, or the State of New Mexico, or any one, ever had any right to sue on and enforce or foreclose the same, such right was, at the time of the filing of the bill of complaint herein, and is now, barred by the provisions of Subdivision 3, Paragraph 2061, Revised Code of Arizona, 1928 (germane to Point 7, Tr. p. 103).

SUMMARY.

We sue on a contract (Exhibit E, Tr. p. 53) dated January 16, 1923, payable annually, the last payment $27,255.00 due January 16, 1928, and that it was extended by Grace V. Wallace (Mrs. Rowell) and Mississippi Valley Life Insurance Company for two years after January 16, 1931. Both Mississippi Valley Life Insurance Company, through the receiver Hershey (Tr. p. 21) and Mrs. Rowell (Grace V. Wallace) (Tr. p. 90) admit both the contract and the extension, have answered by sworn pleadings herein, and have not plead limitation or laches. Republic Life Insurance Company, which must hold under them, have raised the question in motion to dismiss (Tr. pp. 85, 86) and we alleged (Paragraph XVII,

Tr. p. 38) that their contract with Mrs. Rowell (Grace V. Wallace) recognized the escrow contract sued upon.

We plead (Par. XIV, Tr. p. 38) that there never was any transfer of title to Republic Life Insurance Company and their dealings were with full knowledge of our lien.

ARGUMENT AND AUTHORITIES.

This part of the motion to dismiss we think can be classed as a "speaking demurrer" to which must introduce evidence to show facts and we should have the right if plead to meet them by showing some facts which would not place us within the ban of that statute.

The new rules of civil procedure provide for pleading "affirmative defenses" including laches and statute of limitations should be set forth affirmatively.

Rule No. 8-c.

The defense of limitations is a personal one and may be pleaded by the debtor or waived and when the corporation which has given a mortgage does not make such defense it cannot be pleaded by one not vested with title.

Hauchett v. *Blair*, 100 Fed. 817, 41 C. C. A. 76 (9th Circuit).

Coram v. *Davis*, 95 N. E. 298, 209 Mass. 229.

Judge Morrow in the *Hauchett* v. *Blair* (*supra*) case states our position with respect to pleading, and also holding that limitations cannot be plead by a foreign corporation in a foreclosure suit against property within the state.

The case of *Coram* v. *Davis* (*supra*), in which Points 9 to 13 also state clearly our position with reference to raising the question on demurrer, that plaintiff could not sue until proper action was taken by the court, and

also Point 14 contains many citations holding laches must seriously affect the defendant to be a bar in an equity suit.

We plead Republic Life Insurance Company of Dallas, Texas, is a Texas corporation and a citizen and resident of that state, and J. G. Vaughan is a resident and citizen of Texas (Tr. pp. 27, 28), and the motion to dismiss admits these allegations. The Arizona statute specifically provides that being without the state tolls the statute, and this applies to corporations which have never complied with the laws of Arizona.

Revised Code of Arizona, 1928, Article 2066.

We have found no case in Arizona on this, but the California statute seems to cover the same exception, and they have held:

Foreign corporations come within the provisions of statutes which prevent the running of limitations in favor of absent debtor while they are without the jurisdiction of the state.

O'Brien v. *Big Casino G. M. Co.*, 99 Pac. 209, 9 Cal. App. 283.

In Nevada the question was also raised by demurrer but the court held, the allegation of foreign corporation being admitted, they were not entitled to plead limitations.

Nevada Douglas C. C. Co. v. *Berryhill*, 75 Pac. (2d) 992.

See, also, a very exhaustive opinion by Judge Harrison.

Hale v. *St. L. & S. F. Ry. Co.*, 39 Okla. 192, 134 Pac. 949.

And there is a very full and complete note attached to this case, setting out the holdings of many states, in:

L. R. A. 1915C, p. 544.

If the principal debtor left Arizona in 1902, the statute could not be invoked in his favor in 1911, and even if transferred to a corporation which holds title cannot set up limitations, for they occupy the position of merely holder of legal title, and had not paid consideration.

Holmes v. *Bennett,* 127 Pac. 753, 14 Ariz. 298.

The courts of Arizona go far in recognizing the equitable rule as to liens, in holding an unsatisfied mortgage securing a debt barred by limitations will not be removed as a cloud on title without the debt being first paid.

Provident Mut. B. & L. Assn. v. *Schwertner,* 140 Pac. 495, 15 Ariz. 517.

All we ask is the payment of the lien which not one person questions was on the land.

The United States Circuit Court of Appeals for the Eighth Circuit, speaking of laches, said:

> "Laches is an equitable doctrine, not controlled by or dependent upon statutes of limitation, although courts quite generally consider the time fixed by such statutes in actions of law of like character as having some bearing on the pertinency of the doctrine of laches, or, perhaps more accurately stated, on the burden of proof with respect thereto.
>
> "The applicability of the doctrine of laches is dependent upon the circumstances of each particular case. * * *
>
> "Mere lapse of time does not constitute laches. In addition, it must appear that something has occurred that would make it inequitable to grant the relief prayed for. * * *
>
> "Laches cannot exist as to a party, unless he has legal knowledge of the facts affecting his rights. * * *
>
> "The doctrine of laches is to assist and not to defeat justice—it is to be determined by considerations of justice. * * *

"It is sound doctrine that, if a party interposing defenses of laches has been responsible for and substantially contributes to the delay, he is precluded from taking advantage thereof. * * * In *Northern Pacific Ry. Co. et al.* v. *Boyd* (177 Fed. 804, 101 C. C. A. 18), the court said: 'It is impossible to escape the conviction that the delay was not prejudicial to the appellant, but was to its advantage, and that it was largely caused by its own acts * * * Where the party interposing the defense of laches has contributed to or caused the delay, he cannot take advantage of it.' "

Spiller et al. v. *St. Louis & S. F. R. Co. et al.*, 14 F. (2d) 284, 288.

We feel under any circumstances this rule should apply.

Mr. Justice Swayne said that between the vendor and vendee, in a case of this sort, there was a trust which embraced the purchase money and fastened itself upon the land.

The debt did not affect his assignee personally, but it continued to bind the land in all respects as if the transfer had not been made. The trust was an express one.

Lewis v. *Hawkins*, 90 U. S. 119, 23 L. Ed. 113, 114.

It should be remembered that statutes of limitations prescribed by a state do not apply to suits in equity in federal courts.

Hall v. *Ballard*, (C. C. A., 4th Circuit) 90 F. (2d) 939.

Standard Oil of California v. *Standard Oil* (C. C. A., 10th Circuit) 72 F. (2d) 524.

Another question arises.

When does the statute start in case the security is in the hands of the court or receiver?

He cannot act until he finds it is necessary to use the asset, for if it would not have been needed to pay registered policyholders it would have to be returned to Mississippi Valley Life Insurance Company or the receiver who is holder of legal title or his successor or assigns.

It was not until February, 1937, that it "appeared to the court that the assets now in the hands of the receiver are insufficient to pay all claims, etc." (Exhibit B, Tr. p. 50). So until the court determined it was necessary to sue we had no right to sue Mississippi Valley Life Insurance Company, and we filed suit March 22, 1937.

Coambs v. *Central H. & A. S. Co.*, 207 Ill. App. 396.

Coram v. *Davis*, 95 N. E. 298, 209 Mass. 229.

Assessments against stockholders for unpaid capital are not due until call.

In re Phoenix Hardware Co. (C. C. A. 9th) 249 Fed. 410.

Our position is much the same.

See also:

Scovil v. *Thayer*, 105 U. S. 143, 26 L. Ed. 968.
Hall v. *Ballard*, (C. C. A. 4th) 90 F. (2d) 939.
Blackburn v. *Irvine*, (C. C. A. 3d) 205 Fed. 217.
Kirschler v. *Wainwright*, 255 Pa. 525, 100 Atl. 484.

There is a good brief note under this case.
L. R. A. 1917C, 397.

Statute of limitations in this situation was discussed by Mr. Justice Day who said the cause of action did not accrue until the receiver could sue upon the assessment.

Bernheimer v. *Converse*, 206 U. S. 516, 51 L. Ed. 1163, 1176.

It should be remembered that the superintendent of insurance of New Mexico and also the appellant as receiver were charged with a specific trust and duty in the assignments, which were (Tr. p. 76):

> "To have and to hold said securities for the purpose of satisfying just claims of any policyholder in case of possible default of said first party in the matter of satisfying the same."

Neither the superintendent of insurance nor the receiver was entitled to receive the interest or the rents or profits of the land, nor were they entitled to its possession until the court said it was necessary to pay claims and upon demand being made as alleged in Paragraph XXIV, to which no reply was made, no denial of any right was asserted by anyone to our claim.

So as to get the benefit of the plea of laches there must be some material harm to the defendant, and there is none, but on the contrary they have had the benefit of the use of the place without payment of interest, rental or anything.

> *Hauchett* v. *Blair,* (C. C. A. 9th Circuit) 100 Fed. 817.

We, therefore, ask that this court reverse the holding of the district court and overrule the motion to dismiss, and render such judgment with reference to limitations as to the court may seem just and right.

Wherefore, appellant, John T. Watson, liquidating receiver, prays the court to reverse the judgment of the United States District Court for the District of Arizona, filed March 24, 1939, in the above-styled and numbered cause, for the reasons and upon the authorities set out in the specifications of error herein, for appellant feels that he has a good, valid, equitable lien upon the prop-

erty, that he has title and the right to sue thereon, and that his claim is not barred by either limitation or laches, and respectfully requests this court to render such judgment in the premises as may seem just and right.

Francis C. Wilson,
Post-Office Address,
Sena Plaza, Santa Fe, New Mexico,

J. McC. Watson,
Post-Office Address,
Sena Plaza, Santa Fe, New Mexico,

Fred C. Wollenberg,
Post-Office Address,
415 Caples Building, El Paso, Texas.